EDITOR'S NOTE

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ORIGINAL

NO. 85-5776

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1985

WILLIAM BRACY,

Petitioner,

-vs-

STATE OF ARIZONA,

Respondent,

ON WRIT OF CERTIORARI TO THE ARIZONA SUPREME COURT

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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Questions Presented

1. Whether alleged misconduct by the prosecution deprived petitioner of a fair trial or due process of law?

2. Whether petitioner has stated a constitutional claim with respect to the admission of eyewitness identification testimony at trial?

3. Whether a limitation on cross-examination of a rebuttal witness denied petitioner his constitutional right to confrontation?

4. Whether petitioner has stated a constitutional claim with respect to the admission of photographs of the victims?

5. Whether the prosecutor commented on petitioner's failure to testify?

6. Whether petitioner has a constitutional right to jury participation in the capital sentencing decision?

7. Whether Arizona's death penalty statute results in arbitrary and capricious imposition of the death penalty?

TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES

STATEMENT OF THE CASE

At approximately 7:00 p.m. on December 31, 1980, three armed men entered the Phoenix home of Patrick and Marilyn Redmond. The men used their weapons to subdue Mr. and Mrs. Redmond and Helen Phelps, Mrs. Redmond's mother who was visiting for the holidays. After taking money and jewelry from the victims, the assailants herded them into the master bedroom. They then ordered the victims to lie face down on the bed, bound and gagged them, and began shooting them. The assailants also slashed Mr. Redmond's throat with a knife. Both Mr. Redmond and Mrs. Phelps died from gunshot wounds to the head. Although Mrs. Redmond had also been shot in the head, she survived.

One week later the state charged Edward Lonzo McCall with the first-degree murders of Mr. Redmond and Mrs. Phelps, the attempted first-degree murder of Mrs. Redmond, and several other felonies. Five months after that the state charged Robert Charles Cruz with the same crimes; it also added a charge of conspiracy to commit first-degree murder, naming Cruz and McCall as coconspirators. In August of 1981, the state charged petitioner and Murray Hooper with the same crimes it had charged against McCall and Cruz.

On November 9, 1981, the trial of McCall and Cruz began. On December 10, 1981, the jury found both men guilty on all counts. The trial court imposed death sentences for both men.[1]

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1. The Arizona Supreme Court affirmed McCall's convictions and sentences, and this Court denied his petition for writ of certiorari. State v. McCall, 139 Ariz. 147, 677 P.2d 920 (1983), cert. denied, ____U.S.____, 104 S.Ct. 2670, 81 L.Ed.2d 375 (1984). The Arizona Supreme Court reversed Cruz' convictions. State v. Cruz, 137 Ariz. 541, 672 P.2d 470 (1983). He is presently awaiting retrial.

The trial of petitioner and Hooper began in late October of 1982. The state presented testimony from Marilyn Redmond, who identified petitioner, Hooper and McCall as the three men who had entered her home and killed her husband and her mother. Another state witness, Arnold Merrill, described his involvement in the killing of Mr. Redmond. According to Merrill, in September of 1980 Cruz had offered him $10,000 to kill Mr. Redmond, but Merrill refused the offer. In early December of 1980, Merrill accompanied Cruz to the Phoenix airport where they met petitioner and Hooper, who had just arrived on a flight from Chicago. The two men stayed in Phoenix for a week, during which time Merrill drove them around town and introduced them to McCall. Merrill was present when Hooper made an unsuccessful attempt to kill Mr. Redmond. Petitioner and Hooper returned to Chicago a few days later. However, on December 30, 1980, the two men returned to Phoenix. The next night, after the killings at the Redmond home, petitioner, Hooper and McCall came to Merrill's house and told him of the killings. The state also presented testimony from Dean Bauer, who had purchased at Cruz' request airplane tickets to and from Chicago for petitioner and Hooper. George Campagnoni testified that he had driven petitioner and Hooper to the Phoenix airport for return flights to Chicago on December 10 and 31, 1980. Another state witness, Nina Marie Louie, testified that she had met petitioner and Hooper during their first trip to Phoenix in early December, that petitioner had bragged he would return to Phoenix to do a "big job," and that petitioner, Hooper and McCall had left her home on the evening of December 31, 1980, to do their "job."

On December 24, 1982, the jury found petitioner and Hooper guilty on all counts. Pursuant to Ariz.Rev.Stat.Ann. § 13-703, the trial court held an aggravation-mitigation hearing on February 4, 1983. On February 11, 1983, the trial court imposed sentence. The trial court found five aggravating circumstances (that petitioner had prior convictions punishable by death or life imprisonment, that petitioner had prior convictions involving the use of violence, that petitioner created a grave risk of death to Mrs. Redmond, that petitioner committed the murders for pecuniary gain, and that petitioner committed the murders in an especially heinous, cruel and depraved manner) and no mitigating circumstances sufficiently substantial to call for leniency. Consequently the trial court imposed the death penalty for the murders of Mr. Redmond and Mrs. Phelps. The trial court also imposed a life sentence for the conspiracy conviction and prison terms of 35 years for each of the remaining counts. The trial court ordered the kidnapping sentences to run concurrently with each other but consecutively to the attempted murder sentence, that the armed robbery sentences run concurrently with each other but consecutively to the kidnapping sentences, that the burglary sentence run consecutively to the armed robbery sentences, and that the conspiracy sentence run consecutively to the burglary sentence. Hooper received the same sentences.

By notice filed February 16, 1983, petitioner appealed from the judgments of guilt and sentences imposed. On April 8, 1983, petitioner and Hooper filed a motion to vacate judgment. The motion alleged that the

prosecution had failed to disclose information concerning benefits given to Arnold Merrill. The Arizona Supreme Court stayed the appeal pending disposition of this motion. The trial court heard evidence concerning these allegations in July and September of 1983. On October 20, 1983, the trial court made the following findings: (1) that Dan Ryan, an investigator for the county attorney's office, had advanced the sum of $414.00 to Kathy Merrill (Arnold Merrill's wife) for her car payments, that he was only partially reimbursed, and that this assistance was a benefit to the Merrills; (2) that Mrs. Merrill received approximately $3,000.00 from the Maricopa County Attorney's Protected Witness Program; and (3) that Arnold Merrill had made long distance telephone calls from the county attorney's office, some with the knowledge and consent of Dan Ryan. The trial court concluded that these matters should have been disclosed to the defense but were not. However, the trial court denied relief because the matters were cumulative and would not have changed the verdicts. By notice filed November 7, 1983, petitioner and Hooper appealed from that order, and that appeal was consolidated with the earlier appeal.

On June 10, 1985, the Arizona Supreme Court affirmed the convictions and sentences of petitioner and Hooper. State v. Hooper, ____Ariz.____, 703 P.2d 482 (1985); State v. Bracy, ____Ariz.____, 703 P.2d 464 (1985). On August 20, 1985, the Arizona Supreme Court denied petitioner's motion for reconsideration. The instant petition for writ of certiorari followed.

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1257(3).

ARGUMENTS

I

ALLEGED MISCONDUCT BY THE PROSECUTION DID NOT DEPRIVE PETITIONER OF A FAIR TRIAL OR DUE PROCESS OF LAW.

Petitioner contends that misconduct by the prosecution deprived him of a fair trial and due process of law. The Constitution guarantees a fair trial through the due process clauses, and this Court has defined a fair trial as a trial whose result is reliable. See Strickland v. Washington, ____U.S.____, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Respondent submits any misconduct by the prosecution in this case did not deprive petitioner of a fair trial.

Petitioner begins by complaining that the prosecution opposed his pretrial requests for transcripts of related proceedings, access to a computer research terminal, and access to the Redmond home. What petitioner does not mention is that the trial court granted each of these requests. Since petitioner got exactly what he wanted, any "misconduct" by the prosecution with respect to these requests had no effect on the reliability of the verdicts in this case.

Petitioner next points to the prosecutor's opening statement to the jury. In that statement the prosecutor said that Nina Marie Louie had made positive pretrial identifications of both petitioner and Hooper. At the time of the opening statement, the trial court had not yet ruled on a defense motion to suppress Ms. Louie's identifications. The trial court later ruled that the

pretrial identification procedure had been unduly suggestive, and that Ms. Louie would not be allowed to testify about those identifications. Ms. Louie did make in-court identifications of both petitioner and Hooper. At the end of her testimony, the trial court instructed the jury to disregard the prosecutor's reference to pretrial identifications by Ms. Louie. Thus, due to the trial court's ruling and admonition, no prejudice resulted from the prosecutor's statement.

Petitioner alleges the prosecutor acted improperly in submitting to an interview that appeared in a local magazine. Voir dire examination of the jury panel established that no veniremen had seen the article. The trial court then instructed the panel not to read it. Once again, the prosecutor's conduct had no effect on the reliability of the verdicts in this case.

Petitioner also alleges that a key government witness acknowledged at trial that, while he was in custody, an investigator for the prosecution "arranged for his removal from jail so that he could have sex with his wife." (Petition, at 8.) Petitioner has misstated the witness' testimony. What the witness, Mr. Merrill, said was that the investigator had allowed him to visit his wife and that Merrill had used this opportunity to have sexual relations with her. Petitioner presented evidence of this misconduct to the jury and he was free to argue whatever inferences from that evidence he chose. No prejudice resulted to petitioner.

Petitioner complains that the prosecutor in closing argument urged the jury to draw an adverse inference from the fact that a witness had not appeared at the trial. When defense counsel objected to the prosecutor's argument,

the trial court gave the jury an appropriate cautionary instruction. That instruction dispelled any prejudice petitioner may have suffered.

In continuing his attacks on the prosecution, petitioner turns to a series of allegations regarding the prosecution's failure to disclose certain evidence. Petitioner complains of alleged untimely disclosure of a police report that contained "horribly incriminating" statements made by petitioner to another witness and a police officer's handwritten notes that contradicted his final report. Both of these items were inculpatory, not exculpatory, and thus any failure to timely disclose them does not violate this Court's holding in Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), and its progeny. Further, petitioner fails to mention a number of important facts regarding these items. The trial court excluded from trial the report containing petitioner's "horribly incriminating" statements, and the witness to whom petitioner made those statements never testified at trial. As for the handwritten notes, the officer who had made them had testified about them at the trial of McCall and Cruz. The prosecution had provided petitioner with transcripts of that testimony prior to petitioner's trial. Thus, the substance of the notes had been disclosed to the defense, although the actual notes had not. Petitioner argues that his defense was primarily based on a claim of misidentification of petitioner by Mrs. Redmond, and that the prosecution, by failing to disclose the notes, misled him into believing that a strong misidentification defense existed. The untimely disclosure, petitioner asserts, forced a change of strategy in the middle of trial. This is nonsense for a number of reasons. First, it ignores the

fact that the prosecution had provided petitioner with the substance of the notes prior to trial. Second, the notes differed from the final report in one aspect: according to the notes, Mrs. Redmond had told the officer that three men, two of them black and one of them white, had attacked her and her family; according to the final report, Mrs. Redmond said that all three of the assailants were black men. While this distinction may have been critical to a claim by McCall (who is white) that Mrs. Redmond had misidentified him, it is certainly less than critical to petitioner, who is black. Third, there was no change of defense strategy in this case. Mrs. Redmond would have identified petitioner as one of the murderers of her husband and her mother no matter what the officer's notes said. Thus, petitioner's strategy had to be an attack on the accuracy of her identification. Therefore, the prosecution's conduct regarding the "horribly incriminating" statements and the handwritten notes had no impact on the fairness of petitioner's trial.

Petitioner also complains about untimely disclosure of police reports concerning the arrests of three other men as suspects in these killings, photographs of those three men, and the payment of benefits totaling $878 to Nina Marie Louie. Petitioner again omits important facts regarding these items. Petitioner presented evidence to the jury detailing the benefits to Ms. Louie. He could have done nothing more if the evidence regarding the payments had been more timely disclosed to petitioner. As for the photographs of the three suspects, the trial court sustained defense objections to their admission and instructed the jury to disregard any mention of them. Finally, petitioner received copies of the police reports

on these suspects on November 15, 1982 (not November 22 as petitioner alleges). Three weeks later, the defense made use of the reports by presenting evidence of their contents to the jury. Petitioner never asked the trial court for additional time to conduct further investigation into the reports. Thus, petitioner's claim that something more could have been done with the information had it been timely disclosed is a belated attempt to manufacture prejudice where there plainly was none. There is no reasonable probability that the result in this case would have been different had more timely disclosure been made. Therefore, petitioner is not entitled to relief. United States v. Bagley, ___U.S.___, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985); United States v. Agurs, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976); Brady v. Maryland, supra.

For his final attack on the prosecution, petitioner asserts that the prosecution failed to disclose evidence regarding the payment of benefits to Arnold Merrill. These are the same allegations that are the substance of codefendant Hooper's petition for writ of certiorari presently before this Court. See Murray Hooper v. State of Arizona, No. 85-705. The undisclosed evidence regarding Merrill amounted to cumulative impeachment. At trial, petitioner presented a wealth of evidence of this nature to impeach Merrill. Since the trial court and the Arizona Supreme Court considered this undisclosed evidence in the context of the entire record and concluded it would have had no effect on the verdicts, there is no basis for relief from this Court. United States v. Bagley, supra.

II

PETITIONER HAS FAILED TO STATE A CONSTITUTIONAL CLAIM WITH RESPECT TO THE ADMISSION OF EYEWITNESS IDENTIFICATION TESTIMONY AT HIS TRIAL.

Petitioner argues that the admission of identification testimony at his trial deprived him of due process of law. Specifically, petitioner claims that the pretrial identification procedure in which Mrs. Redmond identified him was unduly suggestive and created an intolerable risk that her in-court identification of him was unreliable. Respondent submits that petitioner has failed to state a constitutional claim.

Petitioner is not arguing that the Arizona Supreme Court misapplied the standard set by this Court's decision in Manson v. Brathwaite, 432 U.S. 98, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977), and Neil v. Biggers, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972). Nor is petitioner claiming that there was no evidence to support the Arizona Supreme Court's conclusion that Mrs. Redmond's identification of petitioner was reliable. The Arizona Supreme Court clearly set forth the evidence it relied on in reaching that conclusion. See State v. Bracy, supra, 703 P.2d at 475-76. Petitioner is simply claiming that there is conflicting evidence from which conflicting inferences and conclusions may be drawn. In short petitioner is asking this Court to substitute its assessment of the evidence for that of the Arizona Supreme Court. Such a request does not raise a constitutional claim.

III

THE TRIAL COURT DID NOT DENY PETITIONER HIS CONSTITUTIONAL RIGHT TO CONFRONTATION WHEN IT REFUSED TO ALLOW PETITIONER TO QUESTION A REBUTTAL WITNESS ABOUT A PENDING CHARGE OF CRIMINAL CONTEMPT.

Petitioner contends that the refusal of the trial court to permit cross-examination of the prosecution's investigator on pending contempt charges deprived him of his constitutional right to confrontation. The Sixth Amendment right of an accused to confront the witnesses against him includes the right of cross-examination; that right is enforced against the states under the Fourteenth Amendment. Pointer v. Texas, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965). Respondent submits that the right of cross-examination is not limitless and is subject to reasonable restraints imposed by a trial court.

At trial petitioner and his codefendant elicited testimony fron a number of witnesses to the effect that the prosecution's investigator, Dan Ryan, had engaged in various acts of misconduct in his investigation of the case.[2] The prosecution then called Ryan as a rebuttal witness and questioned him about the allegations the defense had made against him. Prior to cross-examination, petitioner and Hooper asked the trial court to allow them to question Ryan about the fact that criminal contempt charges were pending against him. The trial court denied the request, noting that the charges were not relevant and that any probative value was outweighed by the prejudicial

2. The trial court in the trial of Joyce Lukezic (a codefendant of petitioner and Hooper) had cited Ryan for contempt of court based upon some of the claims of misconduct. Ryan was later acquitted of the charge.

effect. Petitioner and Hooper then cross-examined Ryan about the misconduct allegations; the pending contempt charge was not mentioned.

If the right to effective cross-examination is denied, constitutional error exists without the need to show actual prejudice. Davis v. Alaska, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974). However, the extent of cross-examination is a matter within the sound discretion of the trial court. Alford v. United States, 282 U.S. 687, 51 S.Ct. 218, 75 L.Ed.2d 624 (1931). The record in the instant case establishes that a special, independent prosecutor who was not a member of the office prosecuting petitioner had responsibility for prosecuting Ryan on the contempt charge. The record also establishes that the jury was well aware of the serious nature of the misconduct allegations and of the possibility of criminal liability if the allegations proved true. Thus, Ryan's bias, motive and self-interest were apparent to the jury. The trial court's refusal to allow mention of one additional fact (that a contempt charge was actually pending against Ryan) was not unreasonable and did not result in a violation of petitioner's constitutional rights.

IV

PETITIONER HAS FAILED TO STATE A CONSTITUTIONAL CLAIM WITH RESPECT TO THE ADMISSION OF PHOTOGRAPHS OF THE VICTIMS.

Petitioner argues that the admission of "gruesome" photographs of the victims deprived him of his constitutional right to a fair trial. The admission of evidence of this sort is essentially a matter of trial court discretion, not of federal constitutional rights. The photographs gave the jury a complete view of the murder scene and supported the prosecution's theory that these

were premeditated, intentional, gangland-style contract killings. The defense never conceded that the killings were premeditated or the killers were hired. Thus, the photographs were not offered for the sole purpose of prejudicing the jury against petitioner. Further, the photographs raise no doubts about the reliability of the verdicts in this case. See Strickland v. Washington, supra. Petitioner's position is meritless.

V

THE PROSECUTOR DID NOT COMMENT IN CLOSING ARGUMENT ON PETITIONER'S FAILURE TO TESTIFY.

Petitioner contends that the prosecutor commented in closing argument on petitioner's failure to testify. It is a violation of the privilege against self-incrimination to tell a jury in a state criminal trial that a defendant's failure to testify supports an unfavorable inference against him. Griffin v. California, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965). Respondent submits that the prosecutor did not call attention to petitioner's failure to testify and did not draw any unfavorable inference from that fact.

The remarks petitioner complains of came during the prosecutor's rebuttal argument:

> [THE PROSECUTOR:] Mr. Woods (Hooper's attorney) told you in his opening statement that Cruz and Merrill tried to get Bracy and Hooper involved in the South Phoenix drug deal and Bracy and Hooper said no, take a hike. You didn't hear any evidence to that effect.

Both defense attorneys objected to these remarks and the trial court instructed the jury to disregard them.

The remarks made no reference to petitioner's failure to testify. The prosecutor merely pointed out there had been no evidence to support an allegation by Hooper's

counsel. Such evidence could have come from witnesses other than petitioner or Hooper: Merrill, for instance. Petitioner's claim that the remarks sought to stress his silence as evidence of guilt is baseless. Petitioner is not entitled to relief.

VI

PETITIONER HAS NO FEDERAL CONSTITUTIONAL RIGHT TO HAVE A JURY INVOLVED IN THE CAPITAL SENTENCING DECISION.

Petitioner argues that Arizona's death penalty statute violates his rights under the Sixth and Fourteenth Amendments to have a jury pass on the factual questions that might lead to the imposition of the death penalty. This Court has held that there is no constitutional right to jury sentencing in a capital case. Spaziano v. Florida, ___U.S.___, 104 S.Ct. 3154, 3162-63, 82 L.Ed.2d 340, 351-53 (1984). Petitioner is not entitled to relief from this Court.

VII

ARIZONA'S DEATH PENALTY STATUTE PROVIDES SUFFICIENT GUIDANCE TO THE TRIAL COURT.

Petitioner attacks Arizona's death penalty statute because it does not define what a mitigating circumstance is and because it offers the trial court no guidance on how to weigh mitigating factors against aggravating factors. Thus, petitioner concludes, Arizona's statute results in arbitrary and capricious imposition of the death penalty in violation of the Eighth and Fourteenth Amendments.

Petitioner's position is meritless. Arizona's "open ended" approach to the consideration of any relevant mitigating evidence was mandated by this Court's decisions in Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982), and Lockett v. Ohio, 438 U.S. 586, 98

S.Ct. 2954, 57 L.Ed.2d 973 (1978). In addition, the Arizona Supreme Court has provided sentencing judges with guidance in the areas petitioner complains of. See, e.g., State v. Leslie, No. 5806-2, slip op. at 20-23 (Ariz.Sup.Ct., Oct. 9, 1985)[3]; State v. Gretzler, 135 Ariz. 42, 53-56, 659 P.2d 1, 12-15, cert. denied, ___ U.S.___, 103 S.Ct. 2444 (1983); State v. Mata, 125 Ariz. 233, 241-42, 609 P.2d 48, 56-57, cert. denied, 449 U.S. 438 (1980). Arizona's death penalty procedure sufficiently channels the discretion of the sentencing court in compliance with the concerns voiced by this Court in Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972). Petitioner is not entitled to relief.

CONCLUSION

Because petitioner has failed to establish a violation of any of his constitutional rights, this Court should deny the petition for certiorari.

DATED this 2nd day of December, 1985.

Respectfully submitted,

ROBERT K. CORBIN
Attorney General

Gerald R. Grant

GERALD R. GRANT
Assistant Attorney General

Attorneys for RESPONDENT

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3. Respondent has attached a copy of the Leslie slip opinion as Appendix A to this response.

AFFIDAVIT

STATE OF ARIZONA)
) ss.
COUNTY OF MARICOPA)

GERALD R. GRANT, being first duly sworn upon oath, deposes and says:

That he served petitioner in the foregoing case by forwarding one (1) copy of RESPONSE TO PETITION FOR WRIT OF CERTIORARI, in a sealed envelope, first class postage prepaid, and deposited same in the United States mail, addressed to:

WILLIAM BRACY
Register Number C-01532
Box 99
Pontiac, Illinois 61764

this 2nd day of December, 1985.

Gerald R Grant
GERALD R. GRANT

SUBSCRIBED AND SWORN to before me this 2nd day of December, 1985.

Susan C Lewis
SUSAN C. LEWIS
NOTARY PUBLIC

My Commission Expires:
October 17, 1988

CR43-050/7798D/scl

IN THE SUPREME COURT OF THE STATE OF ARIZONA
En Banc

FILED
OCT -9 1985
CLERK SUPREME COURT
BY

STATE OF ARIZONA, Appellee, v. PAUL CLYDE LESLIE, Appellant.	No. 5806-2

Appeal from the Superior Court of Maricopa County

Cause No. CR-118792

The Honorable Ed W. Hughes, Judge

REVERSED AND REMANDED

Robert K. Corbin, The Attorney General By William J. Schafer III and Georgia Ellerson, Assistant Attorneys General Attorneys for Appellee	Phoenix
Ross P. Lee, Maricopa County Public Defender By Dennis Dairman and James Edgar, Deputy Public Defenders Attorneys for Appellant	Phoenix

CAMERON, Justice

Defendant, Paul Clyde Leslie, was convicted and adjudged guilty of first degree murder, A.R.S. § 13-1105. He was sentenced to death pursuant to A.R.S. § 13-703. We have jurisdiction pursuant to Ariz. Const. art. 6, § 5(3) and A.R.S. §§ 13-4031 and -4035.

We must decide the following issues:

1. Did the trial court properly find that the police had probable cause to arrest defendant?

2. Was defendant denied his right to a speedy trial pursuant to the sixth amendment of the United States Constitution?

3. Did the trial court err in charging the jury by:

   a. failing to give a requested Willits instruction;

   b. failing to give defendant's requested instruction that burglary is a lesser-included offense of felony murder;

   c. failing to inform the jury that no unfavorable inference could be drawn from the failure of a witness to testify?

4. Was the death penalty properly imposed?

The facts follow. On 2 April 1981, the victim, Mrs. Mary V. Rabb, age 70, lived alone in Phoenix, Arizona. One of her neighbors had seen and talked with her that morning at around 7:00 A.M. when the two of them went for a brief walk. Rabb returned home at approximately 7:10. Sometime between 11:00 and 12:00 noon, the two women who lived next door to her noticed that her dog was running loose outside. Because this was unusual, they went to her house to see if everything was all right. Rabb did not come to the door when they knocked and they noticed that her car, a new white Oldsmobile, was gone. They returned to the house at 5:00 P.M., this time entering the premises. Mrs. Rabb's dead body was discovered in the garage. She had been hit

approximately twenty times around her head resulting in her death. Several rugs were covering the victim's body and there was a small, blood-stained ax found in the garage.

On the morning of April 2, 1981, defendant went to the Biltmore Gold and Silver, located several miles from the victim's home, and attempted to pawn several pieces of the victim's silver. When the owner of the store asked for his car registration, defendant left the store and drove away in a new white Oldsmobile, leaving behind the silver and his driver's license. Shortly after noon, defendant picked up two women hitchhikers at 35th Avenue and Buckeye Road. He was wearing women's shoes. One of the women took from the console between the two front seats a ring which was later determined to belong to the victim.

Defendant and his two passengers drove west toward California. When officers at Hope, Arizona, in what was then Yuma County, Arizona, attempted to arrest him for speeding, he exited the freeway, stopped at a gas station, got out of the car and ran, leaving the two women behind. The officers impounded the car and ascertained that it belonged to the victim. Several hours later, defendant was arrested.

At trial, defendant took the stand on his own behalf. He admitted having stolen the silver from Mrs. Rabb's house but denied killing her. He stated that he never saw her that day. He also stated, without offering an explanation, that he had put on one of her shirts and a pair of her shoes. The police were unable to find the shirt and shoes that he discarded. Defendant

was found guilty by a jury on 9 February 1984. From his conviction and sentence, he appeals. He also filed for review of the denial of his petition for post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P., 17 A.R.S. We consolidated the two matters for determination.

THE ARREST

Defendant first argues that the trial court erred in failing to grant the motion to suppress evidence obtained as a result of his illegal arrest.

On 2 April 1981 at 2:45 P.M., D.P.S. Officer Brad Watkins saw a white 1981 Oldsmobile sedan containing at least two people travelling on Interstate 10 near Hope in the Salome-Vicksburg-Wenden area of Yuma County, Arizona. Because the car was exceeding the speed limit, the officer attempted to pull it over. The car exited at Vicksburg Road and stopped at an Arco gas station. When the officer caught up with the vehicle, he saw two women who were attempting to run. He stopped them and they informed him that the car had been driven by a dark haired Mexican or Oriental male, standing approximately 5'8" and wearing dark clothing. The officer ran a license check on the car and determined that it was registered to the victim. The car had not, at that time, been reported stolen. Sergeant Harold and Deputy Pearson of the Yuma County Sheriff's Office also arrived at the Arco station and Officer Watkins related to them the conversation with the women. The women were then transported to the Sheriff's substation.

At approximately 6:00 P.M., the Yuma County Sheriff's Office

received a call that a Mexican looking male wearing dark blue clothing was trying to break into a trailer at that same truck stop. Pearson and Harold arrived at the truck stop and saw defendant standing there. He fit the description given them and they called him over to the car. As he was walking toward them, Sergeant Gosch of the Yuma County Sheriff's Office arrived. He informed the officers that the Phoenix Police Department was investigating a homicide at the home of the owner of the vehicle that Officer Watkins had stopped earlier.

When defendant arrived at the car, Sergeant Harold asked him for identification; he produced a Hawaii driver's license. Officer Pearson then got out of the car and talked to the woman who had telephoned the police about the burglary. She identified defendant as the man she had seen breaking into the trailer. Pearson also inspected the trailer and saw a broken window in the door of the trailer and shoe prints around the door area.

While Officer Pearson was making his inspection, Sergeant Harold talked with defendant. Because Sergeant Harold died prior to the suppression hearing, no testimony was offered as to their conversation. Sergeant Gosch testified, however, that defendant removed some items from his pockets, including the car keys to Rabb's Oldsmobile. Defendant was subsequently placed under arrest.

Defendant contends that "the fact that the [defendant] may have appeared to be a Mexican and was wearing dark clothing in front of a cafe in Salome * * * does not constitute probable cause to arrest him." Citing Florida v. Royer, 460 U.S. 491, 103

S.Ct. 1319, 75 L.Ed.2d 229 (1983), defendant additionally argues that he was arrested when Sergeant Harold asked him to empty his pockets. He, therefore, maintains that the car ke/s should have been suppressed as the fruits of an illegal search. The fourth amendment, U.S. Const. amend. IV, requires a showing of probable cause before a defendant may be arrested. We have defined probable cause as reasonable grounds to believe that an offense is being or has been committed by the person arrested. State v. Wiley, ___ Ariz. ___, 698 P.2d 1244 at 1250 (1985). Additionally, a defendant is arrested when his liberty of movement is interrupted and restricted by the police. State v. Green, 111 Ariz. 444, 446, 532 P.2d 506, 508 (1975). Whether such restriction has occurred is determined by an objective evaluation of the evidence and not by the subjective belief of the parties. Id.

Because Sergeant Harold was unavailable to testify, we are unable to determine whether defendant was free to leave when he emptied his pockets. The state, however, has the burden of showing that the arrest was proper. See State v. Edwards, 111 Ariz. 357, 360, 529 P.2d 1174, 1177 (1975). In the absence of proof to the contrary, we must assume that defendant was arrested at the time he relinquished the keys.

We do not find this assumption defeating, because we believe that the police had probable cause to arrest defendant at that time. They had previously received a report of an attempted burglary and were given a description of the suspect. Defendant both matched this description and was in the area of the crime

scene. It is noted that the Salome-Vicksburg-Wenden area is an area of sparse population, Salome the largest of the three communities having an estimated population of 606. Local people are readily recognized and strangers stand out. It is highly unlikely that there was another similarly dressed person fitting defendant's description in the vicinity. We believe there was probable cause to arrest defendant. We find no error.

SIXTH AMENDMENT RIGHT TO A SPEEDY TRIAL

Defendant next argues that he was denied his right to a speedy trial under the sixth amendment to the United States Constitution. In order to understand this argument, a brief chronology is necessary. Defendant was arrested on 2 April 1981, and indicted six days later. He was subsequently tried, and the jury returned a verdict of guilty to first degree murder on 1 September 1981. The trial judge was thereafter forced to disqualify himself from the sentencing because he had discussed defendant's potential sentence with a member of the victim's family. A new trial was ordered on 19 November 1981, pursuant to State v. McDaniel, 127 Ariz. 13, 617 P.2d 1129 (1980). The state filed a special action on 23 November 1981, appealing the order for a new trial and we declined jurisdiction. The state then sought relief in the court of appeals on 9 December 1981. On 11 June 1982, defendant filed a motion to dismiss the appeal alleging the state's failure to prosecute diligently. This motion was denied on 1 July 1982, by the court of appeals. On 15 February 1983, the state's appeal was transferred to this Court and we ordered a new trial. State v. Leslie, 136 Ariz.

463, 666 P.2d 1072 (1983). After a hearing to determine whether the state had violated Rule 8, Arizona Rules of Criminal Procedure, 17 A.R.S., defendant was retried on 31 January 1984. Defendant now argues that the time between the grant of a new trial by the trial court on 19 November 1981, and the Supreme Court order for new trial issued on 5 July 1983, constitutes "inexcusable delay" and that, pursuant to the sixth amendment, the charges against him should be dismissed with prejudice. We do not agree.[1]

The sixth amendment guarantees a defendant "the right to a speedy and public trial." U.S. Const. amend. VI. This right is triggered by either formal indictment, information or actual restraint of arrest. State v. Soto, 117 Ariz. 345, 348, 572 P.2d 1183, 1186 (1978). The United States Supreme Court has enunciated a balancing test to be used in determining whether a defendant has been denied this constitutional protection. Four factors must be considered: (1) the length of the delay; (2) the reasons for the delay; (3) the defendant's assertion of the right, and (4) the prejudice caused to the defendant. Barker v. Wingo, 407 U.S. 514, 530, 92 S.Ct. 2182, 2192, 33 L.Ed.2d 101

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[1] Defendant raises only the question of the violation of the sixth amendment to the United States Constitution in this appeal. He does not raise the question of violation of our speedy trial rules. Rule 8, Ariz. R. Crim. P., 17 A.R.S. That issue was raised in a special action proceeding (No. 17105-SA). We granted the petition and we remanded the matter to the trial court "for a proceeding pursuant to Rule 32, Arizona Rules of Criminal Procedure, 17 A.R.S. to determine what, if any, prejudice the petitioner, Paul Clyde Leslie, [had] suffered by reason of the delay in bringing [the] matter to trial." The trial court by order dated 5 December 1983 found no prejudice.

(1972). Of these four factors, the length of the delay is the least conclusive and the prejudice suffered by the defendant is the most important. Soto, supra. In fact, the length of the delay is essentially a triggering mechanism necessitating analysis of the other factors. State v. Wright, 113 Ariz. 313, 315, 553 P.2d 667, 669 (1976).

In the instant case, length of the delay, approximately twenty months, is not so long as to be prejudicial per se. Cf. Barker v. Wingo, supra (no per se violation when length of delay was approximately five years); United States v. Deleon, 710 F.2d 1218 (7th Cir. 1983) (no speedy trial violation where 44-1/2 month delay from time of arrest to commencement of trial). It is, however, sufficiently long to cause us to examine other factors.

We look first to the reasons for the delay. The state had filed a special action in this court and then sought relief in the court of appeals contesting the order requiring a new trial. Defendant argues that this was unnecessary and that after we denied jurisdiction the state should have proceeded directly to trial rather than pursuing the matter in the court of appeals. Defendant contends, therefore, that "the delay was totally unjustified."

We have held that the prosecution's exercise of its right to appeal from an adverse ruling is considered a justifiable excuse for delay. See State v. Million, 120 Ariz. 10, 14, 583 P.2d 897, 901 (1978). Thus, the state was within its rights in filing a special action. Furthermore, we do not believe that pursuing an

appeal in the court of appeals after we denied jurisdiction was improper. First, a denial of jurisdiction in a special action does not necessarily constitute a ruling on the underlying merits. Rather, it may indicate that the appealing party has an adequate remedy through the ordinary appellate channels. Thus, our initial denial should not be interpreted as indicating that the state's appeal was frivolous. Second, the prosecution had a strong interest in the appeal. This was a violent crime, which the state had already spent time and effort prosecuting. The state hoped to avoid expending additional time and money in presenting evidence to a second jury. Accordingly, we do not agree with defendant that the delay occasioned by the appeal was unjustifiable. Of course, if it could be shown that the appeal by the state was for the purpose of delay or harassment, we would view the matter differently.

As to the third factor, we find that defendant objected to the delays in a manner sufficient to demonstrate his interest in a prompt adjudication of his guilt. See Barker v. Wingo, supra.

We look then to the last and most important factor -- prejudice to the defendant arising from the delays. Defendant alleges that he was prejudiced in two ways. First, he was incarcerated during this time and the strain of his confinement had a negative impact on his physical appearance, and with it his credibility. Because his credibility was crucial to his defense, he maintains that he was harmed by this imprisonment. The harms alleged by defendant go essentially to his ability to conduct his defense and are speculative in nature. We are unconvinced that,

in general, a period of incarceration tends to impact upon one's credibility and find no evidence that it did so in this case.

Second, defendant contends that the delay caused him to lose a key defense witness. Throughout the trial, defendant admitted that he had burglarized the victim's house but denied killing her. He alleged that another person entered the house later and committed the murder. At the first trial, he had called one of the victim's neighbors, Linda Beverman. She testified that her life had been threatened because of her involvement in a "land deal." She also stated that on the morning of the attack she saw two strange men pacing back and forth between her house and the victim's house and that they frightened her. Defendant had argued that these men had intended to kill Mrs. Beverman but had mistakenly attacked the victim. At some point between the first and second trial, the witness left Phoenix and defendant was unable to find her. At the second trial, defendant was forced to read Mrs. Beverman's testimony from the first trial to the jury, rather than having the benefit of live testimony. He contends that this prejudiced his case.

We do not find that defendant was harmed. Even though we believe that "live" testimony is better than "read" testimony, we find that the prejudice in the instant case was too speculative to support an allegation of a sixth amendment violation. A defendant is entitled to a fair trial, not a perfect one. Bruton v. United States, 391 U.S. 123, 135, 88 S.Ct. 1620, 1627, 20 L.Ed.2d 476 (1968). We find no error.

JURY INSTRUCTIONS

Defendant raises several arguments concerning jury instructions. He argues that the trial court should have given a Willits instruction, an instruction on burglary as a lesser-included offense and an instruction concerning the use of previous testimony.

1. Loss of Evidence

At trial, Police Officer Billy Butler testified that he had examined Mrs. Rabb's car after it had been impounded and that he had noticed several spots on the emblem and the light in the front of the car. Because he believed that these spots were too small, he did not notify the crime lab or ask any technicians to analyze the spots. He did, however, testify as follows on direct examination:

Q. * * * have you had occasion to see blood before?

A. Yes.

Q. Very frequently?

A. Yes.

Q. Do you feel that you can recognize blood if you see it?

A. Yes.

* * *

Q. Now, these photographs marked 13 and 14, are they photographs of the car that you examined?

A. May I see the license plate? Yes, that's the same car.

Q. Now, did you examine that closely on the outside for blood?

A. Yes, we did.

Q. What did you find?

A. I found on the emblem, which is in the middle of the grille, what appeared to be minute spots of what I considered to be blood, also just above the emblem and also by one of the lights, what appeared to be a minute spot of blood.

* * *

Q. Do you have any opinion, based upon your experience, as to whether that was blood or not?

A. Due to my experience as a police officer and the numerous times --

* * *

OBJECTION BY DEFENSE COUNSEL

THE COURT: Overruled, proceed.

Q. (BY MR. LYNCH): What's your opinion?

A. In my opinion that was blood, yes.

* * *

Q. Did you try to scrape that blood off and have it submitted to the crime lab for analysis?

A. No sir, I did not.

Q. Why not?

A. It was too minute of an amount for the crime lab.

The state also called as a witness Everett Allen Raphael, a criminalist for the city of Phoenix. He stated, on cross-examination, that there was a sufficient amount of substance on the car to allow him to determine whether it was blood, although he would be unable to determine the type grouping or anything further. In closing argument, the prosecution also

stated:

> What about the blood on the car? Okay. Detective Butler should have had the car checked out by the crime lab. There is no question about that, and we can all see that, I can see it. * * * The fact of the matter is, it looked like blood.
>
> Detective Butler has seen blood before, you have all seen blood, there is a pretty strong inference that it was blood, blood that was put on the car after Mary Rabb was killed.

The fact that these spots may have been blood was a vital part of the state's case. Defendant admitted that he had burglarized the victim's residence but claimed he never saw her. The body was found in the garage near where the automobile was parked. There were no fingerprints on the murder weapon; neither was there blood on defendant nor on the inside of the car. In addition to its allegation of blood on the car, the state relied on the fact that defendant had admitted his presence in the house, that he was in possession of a ring that the victim usually wore, that he was wearing some of the victim's clothes, that a water hose in the backyard was uncoiled and that there was a damp towel found in the victim's house. The blood would indicate that the car was in the garage at the time of the murder and contradict defendant's testimony that he had not seen the victim at the time he burglarized the house and stole the car.

Based on this testimony, defendant requested a Willits instruction. See State v. Willits, 96 Ariz. 184, 393 P.2d 274 (1964). The trial court denied this request. Defendant contends this was reversible error.

The question of lost or destroyed evidence has generated a

great deal of case law. When items are lost or destroyed a defendant is unable to determine whether they would have been helpful in his defense. Our court has used, as one method of overcoming this problem and ensuring a fair trial, the Willits instruction. That instruction states:

> If you find that the state has destroyed, caused to be destroyed, or allowed to be destroyed any evidence whose contents or quality are in issue, you may infer that the true fact is against the interest of the state.

State v. Willits, supra.

In the instant case, we are concerned with evidence that was allowed to be destroyed or lost. The state has a duty to act in a timely manner to preserve evidence that is obviously material and reasonably within its grasp. State v. Perez, 141 Ariz. 459, 463, 689 P.2d 1214, 1218 (1984). A defendant is entitled to a Willits instruction upon proof that (1) the state failed to preserve material evidence that was accessible and might have tended to exonerate him and (2) there resulting prejudice. State v. Moffitt ___ Ariz. ___, 702 P.2d 681, 690 (1985). Further, a trial court's determination on whether or not to give a Willits instruction is not reversible error absent an abuse of discretion. Id.

The state's questions during trial and comments during closing argument testify strongly to the materiality of the lost evidence. Additionally, the state's own expert testified that he could have determined whether the substance had indeed been blood. Therefore, the first requirement of the test is met.

The issue of prejudice is crucial in the present case. Where the state places reliance on the evidence as blood, its duty of preservation becomes increasingly important. It is fundamentally unfair to allow the state to introduce conclusions as to the contents of certain evidence against a defendant without allowing him to inspect it in a manner that allows for meaningful rebuttal. Scales v. City Court of City of Mesa, 122 Ariz. 231, 234, 594 P.2d 97, 100 (1979). We might be able to overlook the failure to preserve the evidence had the state not emphasized the fact it was blood. The state, in effect, created prejudice by using the blood to contradict the defendant's claim that he had never seen the victim. Thus we find prejudice in the state's failure to remove the spots and have them preserved, coupled with the state's affirmative comments concerning the fact that the spots were blood. We hold that the trial court's failure to give the requested Willits instruction was an abuse of discretion amounting to reversible error.

2. Linda Baverman's testimony.

Defendant submitted two alternative instructions concerning Linda Baverman's testimony:

> (1) A good faith effort has been made by the defendant to locate Linda Baverman; thus, no unfavorable inference can be drawn against the defendant from her failure to appear and testify.
>
> (2) A good faith effort has been made to locate Linda Baverman; thus, no unfavorable inference can be drawn from her failure to appear and testify.

The trial judge refused to give these charges. Defendant now

maintains that the failure to give these requested instructions constituted reversible error. He gives two reasons for this assertion. First, he argues that "[b]y refusing to instruct the jury regarding how it was to evaluate the Beverman testimony, the court left open the possibility that the jury could disregard it merely because said witness was not present at trial." Second, defendant contends that the trial court's refusal to explain that no unfavorable inference could be drawn from defendant's use of previous testimony constituted fundamental error because the trial court failed to instruct "on all matters vital to the consideration of the evidence."

First, we find the claim that the jury might have disregarded Mrs. Baverman's testimony because she was not present to be without merit. The trial judge told the jury that it must decide the accuracy of <u>each</u> witness' testimony and the jury was aware that Mrs. Baverman was considered to be a witness. Additionally, both the prosecution and defense counsel spent several minutes addressing her testimony in their closing arguments, thus ensuring that the jury would realize the importance of her testimony and evaluate it during deliberations. Admittedly, as we have noted above, reading testimony is not the same as live testimony but we do not believe this demands a specific instruction in every case. The necessity for an instruction regarding the absence of a witness will be left to the sound discretion of the trial court.

We also reject defendant's second argument that failure to give the requested instruction constituted fundamental error.

Defendant contended that the jury might falsely infer that defendant was trying to hide something by not producing a live witness and felt that the jury charge was essential to eliminate this possibility. We do not find that failure to give this requested instruction was erroneous. "A judge need not give instructions on every subsidiary fact and possible inference. * * * As long as a judge gives adequate and clear instructions on the applicable law * * * [the] extent of the charge [is a matter] within his discretion." Commonwealth v. Phong Thu Ly, 471 N.E.2d 383, 384 (Mass. App. 1984). Jury instructions become too cumbersome if the trial judge is forced to instruct on minute, nonessential matters. The trial court must be able to limit what he will say to the jury in order that the instructions do not become so long and complex as to be confusing and useless. Even though, in the instant case, the offered instruction may have been a comment on the evidence where the defendant faces a murder conviction and presents only one witness, the trial judge sacrifices little efficiency by giving a clarifying instruction which explains to the jurors the status of the testimony that is read to them. The failure to read the defendant's instruction, less the comment on the evidence, though perhaps regretable in retrospect, falls short of fundamental error. Our reading of the record reveals no prejudice or abuse of discretion due to the omitted instruction. We find no error.

3. <u>Instruction on the lesser-included offense.</u>

Defendant requested the following jury instruction:

> [T]he crime of murder first degree committed in the course and in furtherance of the crime

> of burglary second degree includes the less serious charge of burglary second degree. The State may prove burglary second degree but fail to prove the more serious crime of murder first degree committed in the course of and in furtherance of the crime of burglary second degree.
>
> You are permitted to find the defendant guilty of the less serious crime of burglary second degree one, if the evidence does now show beyond a reasonable doubt that the defendant is guilty of murder first degree in the course of and in furtherance of the burglary second degree;
>
> And if the evidence does show beyond a reasonable doubt the defendant is guilty of burglary second degree.

The trial court denied this request. Defendant now contends that because burglary is a lesser-included offense of felony murder and because there was sufficient evidence to warrant an instruction, the judge's denial constituted prejudicial error.

We disagree for two reasons. The instruction is incorrect in that it implies that to be guilty of felony murder defendant must be guilty of first degree murder in addition to burglary. This does not correctly state the law. A person may be guilty of felony murder even though the killing standing alone would be second degree murder. It is the fact that the homicide was committed during a felony (burglary) that can raise what otherwise would be a second degree murder to murder in the first degree. It is the felony that provides the malice which makes it first degree murder. State v. Ferrari, 112 Ariz. 324, 541 P.2d 921 (1975). The instruction being incorrect, the judge did not err in refusing to give it. State v. Axley, 132 Ariz. 383, 393, 646 P.2d 268, 278 (1982).

Neither do we believe, as defendant contends, that burglary is a lesser-included offense of felony murder. Garrett v. United States, 471 U.S. ___, 105 S.Ct. 2407, 85 L.Ed.2d 764 (1985).

DEATH PENALTY

The special verdict of the trial court at sentencing stated "There are no mitigating circumstances." Defendant argues that the trial court improperly concluded that there were no mitigating factors. He urges us to remand the case for resentencing and issue guidelines requiring trial judges to give detailed statements of whether and why they have found the existence or nonexistence of mitigating factors. We agree with defendant that the trial court erred and take this opportunity to clarify the procedural requirements of A.R.S. § 13-703(D).

In conducting a hearing in aggravation and mitigation, pursuant to A.R.S. § 13-703, the trial court acts first as the fact finder. It must consider whether the state has proven any of the aggravating factors enumerated in § 703(F) beyond a reasonable doubt. State v. Carriger, 143 Ariz. 142, 692 P.2d 642. It must also determine whether the defendant has shown mitigating circumstances by a preponderance of the evidence. State v. McMurtrey, 143 Ariz. 71, 73, 691 P.2d 1099, 1101 (1984). Mitigating circumstances are defined as "any factors * * * relevant in determining whether to impose a sentence less than death * * *." A.R.S. § 13-703(G). After the trial court has made these findings of fact, it then engages in a balancing test in which it determines whether the mitigating factors are sufficiently substantial to call for leniency. § 703(C).

In the case at bar, defendant introduced evidence that he was a model prisoner. He also argued that there was evidence that another person had been present who did the actual killing. See Enmund v. Florida, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982). On appeal, defendant pointed to several other factors, of which the trial court was aware: defendant's lack of a criminal record for violence; defendant's service in the United States Marine Corps and the fact that defendant was 24 at the time of the crime. The presentence report also contained relevant information. Although the investigating officer noted that defendant had been in and out of jail and had failed to keep in contact with his probation officer or take advantage of the rehabilitative process, he described defendant as "an intelligent and personable individual who would probably not plan the murder of an individual * * * for personal gain." Additionally, the officer indicated his agreement with defendant's attorney that the murder was a spontaneous killing.[2] With the exception of defendant's claim that another committed the murders, the state presented no evidence rebutting defendant's proof as to mitigating factors.

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[2] Defendant claimed, at oral argument, that Detective Oviedo, the chief homicide officer on the case, indicated his belief that the victim caught defendant burglarizing her residence and went after him with a hatchet. The only evidence that this was his opinion is found in a letter, attached to the presentence report, written by defendant's attorney paraphrasing the detective. When the probation officer interviewed the detective, however, Oviedo made an official recommendation that defendant receive the death penalty.

A.R.S. § 13-703(D) requires the sentencing court to "return a special verdict setting forth its findings as to the existence or nonexistence of each of the circumstances set forth in subsection F of this section and as to the existence of any of the circumstances included in subsection G of this section." A number of trial courts have interpreted this as requiring them to state, on the record, their reasons and conclusions, as to both the existence and nonexistence of mitigating factors. See e.g., State v. Smith, 141 Ariz. 510, 687 P.2d 1265; State v. Caja, 126 Ariz. 35, 612 P.2d 491 (1980). Although we have previously stated that such detailed findings are neither required nor necessary, State v. Vickers, 129 Ariz. 506, 516, 633 P.2d 315, 325 (1981), we believe that the better practice is for the trial court to place, on the record, a list of all factors offered by a defendant in mitigation and then explain his reasons for accepting or rejecting them. Thus, the reviewing court can be sure that all mitigating factors have been considered by the court prior to sentencing. See Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) (United States Supreme Court held unconstitutional death penalty statutes that restricted the right of a defendant to show mitigating circumstances that might relieve him of the death penalty) and Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982) (Requiring courts must consider all relevant mitigating evidence). Id. at 117, 102 S.Ct. at 878, 71 L.Ed.2d at 12. Justice O'Connor, in her concurrence, explained that when it was unclear whether the trial court has considered all mitigating factors, the case must be

remanded:

> In any event, we may not speculate as to whether the trial judge and the Court of Criminal Appeals actually considered all of the mitigating factors and found them insufficient to offset the aggravating circumstances * * *. Woodson and Lockett require us to remove any legitimate basis for finding ambiguity concerning the factors actually considered by the trial court.

Id. at 119, 102 S.Ct. at 879, 71 L.Ed.2d. at 14. In short, if we cannot determine from the record whether the trial court considered all the relevant mitigating factors, the federal constitution compels us to remand the case for further explanation. Practically, unless the trial judge tells us what factors he has considered and why he has rejected them, we cannot assure ourselves that he has acted properly.

Because we are remanding for new trial, we do not address defendant's other arguments concerning the propriety of his sentence or the constitutionality of the death penalty. Reversed and remanded for new trial.

JAMES DUKE CAMERON, Justice

CONCURRING:

WILLIAM A. WOLFMAN, Chief Justice

JACK D. H. HAYS, Justice

FELDMAN, Justice, concurring in part and dissenting in part,

I agree with the result and with all portions of the opinion except that (slip op. at 20) in which the majority concludes it is unnecessary to give instructions which would permit the jury to find defendant guilty of burglary but not guilty of felony-murder. I believe that under the facts of this case such instructions are required. Beck v. Alabama, 447 U.S. 625, 100 S.Ct. 2382 (1980).

Defendant admitted that he committed burglary but claimed that Mrs. Rabb was alive when he left the house and that two unidentified persons later entered the house, assaulted and killed her. This version of the events received some support from the testimony of a neighbor who reported having seen two suspicious looking characters peering over the victim's wall. Thus, a clear question of fact was presented and, if defendant's version was believed by the jury, it should have convicted his of burglary but acquitted his of murder. By refusing to give instructions that would have permitted this result, the court presented the jury with the Hobson's choice of either freeing an admitted criminal or convicting his of felony-murder. This is the very result which Beck held was forbidden by the Constitution because it enhances the possibility that the jury will erroneously find the defendant guilty of the felony-murder charge. The risk of such a result "cannot be tolerated in a case in which the defendant's life is at stake." Beck, supra, at 637-638, 100 S.Ct. at 2389-2390.

In reaching their conclusion, the majority of this court cites Garrett v. United States, 471 U.S. ____, 105 S.Ct. 2407 (1985). That case concerned multiple punishments, a legal issue unrelated to the Beck

principle. Further, the majority gains no support from the technical distinctions of lesser included offense made by Arizona cases such as State v. Arias, 131 Ariz. 441, 641 P.2d 1285 (1982).

> The element the Court in Beck thought essential to a fair trial was not simply a lesser included offense instruction in the abstract, but the enhanced rationality and reliability [which] the existence of [such] an instruction introduced into the jury's deliberations. . . .
>
> The Court in Beck recognized that the jury's role in the criminal process is essentially unreviewable and not always rational. The absence of a lesser included offense instruction increases the risk that the jury will convict, not because it is persuaded that the defendant is guilty of capital murder, but simply to avoid setting the defendant free. In Beck, the Court found that risk unacceptable and inconsistent with the reliability this court has demanded in capital proceedings. [citation omitted] The goal of the Beck rule, in other words, is to eliminate the distortion of the fact-finding process that is created when the jury is forced into an all-or-nothing choice between capital murder and innocence.

Spaziano v. Florida, ___ U.S. ____, 104 S.Ct. 3154, 3160 (1984).

This principle controls the situation presented by the case before s and requires that the burglary instruction be given. In my view, the question is not whether the underlying felony meets the technical definition of a lesser included offense when the charge is felony-murde. Rather, the question is whether the evidence would support a verdict thr the defendant is guilty of the underlying felony but not of felony-murdr. In such a factual context, Beck teaches that the jury cannot be presenti with an all-or-nothing choice but must be given the third option. The ury must be able to reach and decide those issues fairly presented by the

evidence. A different rule cannot be justified.

STANLEY G. FELDMAN, Justice

I join in Justice Feldman's opinion.

FRANK X. GORDON, JR.,
Vice Chief Justice